opinion was, however, *obiter;* the defender there had acquired a foreign domicile, and the case was one of contract, not delict.

The pursuers' counsel argued that the question as between personal citation on the one hand, and edictal or other citation on the other, was here immaterial and irrelevant, looking to the fact that the defender has appeared and lodged defences. I think the pursuers put their argument too high. It is true that when a defender appears in Court it is no longer open to him to take objection to irregularities in the form of his citation; but I cannot hold that by appearing to object to the jurisdiction of the Court he is foreclosed from arguing that jurisdiction is excluded in respect that the citation was not personal, and that in the absence of such citation within the territory domicile of origin and *locus delicti* are insufficient grounds for sustaining jurisdiction. The defender is a domiciled Scot, and was at the time of the alleged delict (February 1913) resident here. He has now it seems no fixed or permanent residence anywhere, and I do not know what *forum* is suggested as the proper and convenient one in which he can be called to answer to the pursuers' charge. In the circumstances of the case, which are somewhat special, I am of opinion that we have and ought to exercise jurisdiction. I do not, however, think that it is necessary or would be advisable to lay down as an absolute or general rule that Scots domicile combined with *locus delicti* in Scotland will in all cases lead to a similar result.

[*His Lordship here dealt with points with which this report is not concerned.*]

LORD MACKENZIE—The facts of this case make it a special one. The *locus delicti* was in Scotland, for I regard the action as in form only one of relief. The defender's domicile of origin is Scots, and the evidence plainly shows he has never lost his Scots domicile. His plea of no jurisdiction is founded upon the maxim *actor sequitur forum rei.* But when his account of himself is examined it is apparent that to give effect to that doctrine would be a denial of justice, for there is no form to which the pursuers could have recourse other than the courts of this country. In the circumstances, therefore, of this case I am of opinion there is sufficient to warrant us in sustaining the jurisdiction of this Court. There is no case which prevents our coming to that conclusion. The point seems to have been reserved by the Lord Justice-Clerk (Inglis) in *Johnston* v. *Strachan,* 23 D. 758. The case is entirely different from one in which a defender whose domicile of origin is in Scotland is resident, *e.g.*, in London, in which case it might be that the pursuer should follow him there even though the *locus contractus* or *locus delicti* was in Scotland.

I wish, however, to say that I cannot take the view that "valid citation," to which the Lord Ordinary refers, has anything to do with the matter. Citation is the calling of a defender to appear in Court, but the antecedent to "valid citation" is that the Court has jurisdiction to issue the summons. If it has not, the defender may appear and maintain that there is no jurisdiction. His appearance, though it bars him from objecting to the technical conclusions of the citation, puts no obstacle in the way of his arguing that there is no jurisdiction.

There are, no doubt, passages in the text writers, and in the cases which have been cited and examined with reference to the present case, in which the element of personal citation has been considered essential. It has been decided that there is jurisdiction in the court of the *locus contractus* or *locus delicti* when there has been personal citation. The underlying principle, however, is deeper than due observance of the requisites of citation. It is because the defender is personally present within the territory of the Judge—"Contractus forum tribuit, si contractus in eodem loco referiatur." As in the case of contract, so in the case of delict. In remitting the case of *Pedie* v. *Grant,* 1 W. & S. 716, the Lord Chancellor said he found in books of more or less authority treating upon the law of Scotland that not only the contract should be made in Scotland, but that the defender should be found there. This is not merely a matter of citation. In the present case it was admitted that the proper mode of citation was edictal. This could not affect the question of whether the Court has jurisdiction. In the course of the argument some observations were made upon the preventive jurisdiction of the Court. Upon this I will only say that, in my opinion, dicta on the subject of jurisdiction of that character are not necessarily to be applied to cases of delict. [*His Lordship here dealt with points with which this report is not concerned.*]

In the present case I agree that the defender's first plea-in-law should be repelled.

LORD JOHNSTON and LORD SKERRINGTON were absent from the hearing.

The Court affirmed the interlocutor of the Lord Ordinary and repelled the plea for the defender of no jurisdiction.

Counsel for the Pursuers (Respondents)—Constable, K.C.—Lippe. Agents—Simpson & Marwick, W.S.

Counsel for the Defender (Reclaimer)—Wilson, K.C.—Aitchison. Agents—Balfour & Manson, S.S.C.

Thursday, March 11.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

WALKER *v.* NISBET.

Process — Proving the Tenor — Incidental Proof of Tenor—Sheriff Court Process —Casus amissionis.

In an action in the Sheriff Court to recover the contents of a promissory-note alleged to have been lost while in the custody of a co-obligant, objections to the competency of questions as to

whether certain witnesses had seen the promissory-note in the pursuer's possession were sustained. *Held* that the questions had been rightly disallowed as an attempt to prove the tenor of the note incidentally without a separate action, and that such procedure was incompetent where the document attempted to be set up was the basis of the action and there was no relevant averment of *casus amissionis*.

James Walker, farmer, Dumbarton, *pursuer*, brought an action against James Y. Nisbet, residing at Currie, Midlothian, *defender*, for payment of £265, the amount, as averred, of a promissory-note payable by the defender and signed by the pursuer as his cautioner, which sum had been paid by the pursuer on behalf of the defender to the National Bank of Scotland, Limited, Bathgate, on or about 13th February 1905, and the defender had undertaken in writing to repay.

The following narrative of the *facts* is taken from the opinion of Lord Salvesen:—"The claim in this case is based on the following averment. The pursuer is brother-in-law of the defender, and he, along with the defender's father and brother, became parties to a promissory-note in May 1901 with the view of providing money to enable the defender to take a farm. The note was renewed from time to time, and the amount increased until in the end of 1904 the ultimate renewal was for a sum of £265. The promissory-note, which was in the hands of the agent of the National Bank of Scotland at Bathgate, bore the signatures of Gavin Nisbet, Robert Nisbet, and the pursuer. At or before the date it fell due the pursuer obtained an undertaking by the defender and his wife to repay this sum, and an undated document which is capable of being so construed, signed by these parties, is produced. On the faith of this undertaking the pursuer and Robert Nisbet borrowed from a Mrs Loudoun a sum sufficient to meet the promissory-note when it fell due on 13th February 1905. The pursuer avers that with this money he paid the bank the amount due and took up the promissory-note which he placed in the custody of Robert Nisbet. There is no written evidence of the existence of the promissory-note except a notice from the bank in these terms—'Bill for £265 drawn on you by Gavin Nisbet and others falls due at this office on 13th inst. The National Bank of Scotland, Limited, Bathgate, 6th February 1905." This notice does not appear from its terms to refer to a promissory-note, but is rather descriptive of a bill drawn on the Robert Nisbet to whom it was addressed by Gavin Nisbet and others, but I shall assume in the pursuer's favour that it had reference to the promissory-note to which he depones. The bank books contain no entry of the payment of any such promissory-note. This again is sought to be explained by the fact that the then agent of the bank had entered on a course of conduct in order to conceal certain defalcations which were afterwards ascertained, one of his methods apparently having been to enter as paid obligations constituted by bill which had not been truly paid in cash, and not to enter bills which he had accepted in renewal of others. Thus a previous promissory-note, of which that payable on 13th February 1905 is said to have been a renewal, is marked in the bank books as paid, and there is no entry of the later note. The result is that there is not even an entry in the bank books of the payment of the promissory-note on which the pursuer bases his claim."

The pursuer pleaded—"(1) The pursuer, an accommodation party to the promissory-note condescended on, having on the faith of defender's obligation paid to the bank the sum in said promissory-note, is entitled to decree as craved, with expenses. (2) The defender having undertaken to the pursuer to pay the said sum contained in said promissory-note, and pursuer having paid said promissory-note on the faith of said undertaking, as condescended on, the pursuer is entitled to decree against the defender therefor. (3) The sum sued for being still due and resting-owing by the defender to the pursuer, decree should pass therefor, with interest and expenses, as craved. (4) In any event and *separatim*, the defender having obliged himself to pay the pursuer and the deceased Robert Nisbet the sum necessary to retire said promissory-note, and said promissory-note having been retired by them by payment, the pursuer is entitled to decree for one-half of the sum sued for, with expenses."

The defender pleaded, *inter alia*—"(7) The pursuer's material averments can be proved only by writ or oath of the defender."

On 3rd October 1913 the Sheriff-Substitute (GUY) allowed a proof, in the course of which he sustained certain objections to the admissibility of evidence tendered by the pursuer, including questions the purpose of which was to prove that witnesses had seen the promissory-note in question in the pursuer's possession. On 1st December 1913 the Sheriff-Substitute granted leave to the pursuer to appeal to the Sheriff upon these objections, and on 11th December 1913 the Sheriff (MACONOCHIE) adhered, and remitted to the Sheriff-Substitute for further procedure. On 22nd January 1914 the Sheriff-Substitute found in fact that the pursuer had failed to prove that he made payment on behalf of the defender to the National Bank, Bathgate, of the sum of £265, found in law that the pursuer was not entitled to decree against the defender, and assoilzied him from the conclusions of the action.

The pursuer appealed to the Court of Session, and argued—It was competent for the pursuer to prove the terms of the promissory-note incidentally in the Sheriff Court process. No separate process of proving the tenor was necessary—*Young* v. *Thomson*, 1909 S.C. 529, 46 S.L.R. 143. The questions should therefore have been allowed.

Argued for the defender—The questions had been rightly disallowed. *Young* v. *Thomson* (*cit. sup.*) was not an authority for holding that a separate action of proving

of the tenor was unnecessary. The note was the foundation of this action and there was no relevant *casus amissionis*.

LORD JUSTICE-CLERK—What the pursuer here seeks to do is practically to prove the tenor of a document said to be missing, and that not by a proper process of proving the tenor, but as an incident in an ordinary action. Assuming that this might be permissible, the pursuer's attempt is to prove by parole evidence that he paid £265 to a bank in order to get up a promissory-note on which he was a co-obligant with two others. I am clearly of opinion that such an attempt was incompetent, and was rightly decided to be so.

The pursuer further proposed to prove by parole evidence that certain people had seen this promissory-note in his possession, obviously that they might speak to its terms. To make such proof competent, as in a proving of the tenor, very specific averments would be necessary, and here there was no such process, and could not be, as a proving of the tenor is only competent in the Court of Session. But on the assumption that an incidental inquiry of this kind might be competent, I have no difficulty in holding that what the pursuer seeks to prove here cannot be reached in such a way. Here the document to which the question related was necessarily the very basis of the action, and calls for a proper setting forth of a *casus amissionis* entitling the party to lead evidence otherwise not competent as proof.

The case here being that the pursuer desires to have it held that he took up and got into his possession the promissory-note in question, the direct way of meeting this would be that he should produce it. This he is unable to do. Now it is, I think, plain that in the case of such a document as a bill of exchange or promissory-note very strong reasons would be necessary to induce the Court to allow proof to set up the debt of which, if produced, it might be proof. The case quoted tends to show this. Here the success of the pursuer would depend on his being able to satisfy the Court that it had gone missing in such circumstances that it could be held to be still in force, for the natural presumption, redarguable only by strong proof, is that a bill that cannot be produced is no longer in force. It is a document which if it gets into the hands of an obligant does so because he has met his liability, and he is therefore entitled to destroy the document of debt.

I am unable to hold that in this case there is any proper averment to entitle the pursuer to the concession as regards mode of proof which may be granted in a proper case of *casus amissionis*. That the pursuer avers that he placed the promissory-note in the custody of another co-obligant, and that on a search it cannot be found, amounts to no more than an assertion of loss, but states nothing relevant as to cause. He in no way accounts for the loss. There is no case of alleged fraud or of accident, such as fire—the averment is the bare averment of loss and nothing else. Nothing is set forth or competently proved to negative the legal presumption that the note may have quite legitimately ceased to exist as an enforceable document of debt.

I do not enter into further detail or an examination of the authorities quoted to us, as this has been done very fully in the opinion of Lord Salvesen, which has my entire concurrence. I would move your Lordships to find in terms of the findings in the Court below and to assoilzie the defender.

LORD SALVESEN—[*Read by Lord Guthrie*]—[*After narrating the facts, supra*]—In these circumstances the pursuer has attempted to prove by parole the fact that he paid a sum of £265 to the bank to meet a promissory-note which he had granted along with two other co-obligants for the defender's accommodation. Both of the Sheriffs have held such a proof incompetent, and accordingly disallowed questions which were put with that object. In my opinion they were right in so doing, and the contrary was indeed not very strenuously maintained.

The pursuer, however, took exception to the disallowance of other questions which were put, the purpose of which was to prove that witnesses had seen the promissory-note in question in the pursuer's possession, and I presume that if these questions had been allowed the witnesses would have been asked to speak to its terms. I do not think these questions would have been incompetent in a proper action of proving the tenor, assuming that a proof had been allowed on relevant averments. Such an action is not competent in the Sheriff Court; but there are cases where the contents of a writing which is no longer in existence may be proved incidentally without the necessity of bringing an action of proving the tenor. An illustration of this rule is found in the case of *Young* v. *Thomson*, 1909 S.C. 529. It is, however, noteworthy that the action there had been commenced in the Court of Session, and that the writ which was allowed to be proved incidentally consisted of entries in a pass-book which ought to have been in the possession of the pursuer but was alleged by him to have been lost. It was further pointed out by Lord Dundas that the missing document was "not of the quality, *e.g.*, of a title-deed, but of a much humbler kind; and is not substantively founded upon as the basis of an action, but pleaded by way of exception to prove the extinction of a debt." In all these respects the present case is in marked contrast. The pursuer's case depends entirely on his being able to establish that he took up a promissory-note to which he had become a party for the accommodation of the defender, and the best evidence of this would have been the production of the promissory-note itself. Without it he has nothing but parole evidence, and although the two documents I have already referred to might be good adminicles in an action of proving the tenor, no proof would have been allowed in such an action unless a proper *casus amissionis* had been relevantly averred. This I think follows from a series of cases. Thus in *Carson* v. *M'Micken*, May 14, 1811 F.C., in an action of proving the tenor of a bill said to

be lost, the Court refused to allow a proof that it had once existed, no special *casus amissionis* being offered to be proved. The only averment made was that the bill had been delivered by the pursuer to a writer in Stranraer to operate payment from the heirs and representatives of M'Micken, but that he somehow or other had lost the bill. The opinion of the Court proceeded on two grounds—"1st, that it was extremely dangerous to admit a proving the tenor of a document of debt which was of such a nature that an extinction of the debt itself might be presumed from the document not being in the creditor's possession . . .; and 2ndly, that proving the once existence of a bill . . . as a conclusive proof of the tenor of it could be of no use, as such would by no means substantiate that the debt still existed, or do away the possibility that it had been paid and the bill given up." Again, in *Macfarlane* v. *M'Nee*, March 1, 1826, 4 S. 509 (517), which was also an action of proving the tenor of a bill of exchange, the Court appointed the pursuer to lodge a condescendence of the facts he offered to prove. The *casus amissionis* as there averred was that the pursuer had transmitted the bill to his agent in Glasgow, who was carrying on some proceedings for his behoof before the Commissary Court there; that the agent had placed it amongst the papers in these proceedings although it did not form part of the process; that the papers were borrowed by the agent for the defender with the bill amongst them, and that it had never since appeared, notwithstanding the strictest search. These averments disclosed what in the case of documents of a different kind would have been a proper *casus amissionis;* yet the Court dismissed the action, being of opinion that while there might be cases where a proving of the tenor of a bill of exchange ought to be allowed, it was a matter of great delicacy, and should not be permitted except on strong grounds. Lastly, in the case of *Winchester* v. *Smith*, March 20, 1863, 1 Macph. 685, it was laid down that it was incumbent on the pursuer in an action of proving the tenor, not only to prove that such a writing existed and that it was expressed in the terms alleged, but likewise that it had been lost or destroyed in some way which did not affect its validity; and it was observed that if it be such a writing as is usually cancelled or destroyed when it has served its purpose, as, for example, a bill of exchange or promissory-note or a personal bond, and such writing has been destroyed or lost, the presumption is that the right of which it has originally been the evidence no longer subsists, and very clear evidence is required to overcome the presumption.

Applying the law as laid down in these cases I am clearly of opinion that the pursuer's case fails. His only averment on the subject of the promissory-note is that it was placed by him in the custody of a co-obligant Robert Nisbet, "and although search has been made amongst his papers it has not yet been found." This does not disclose any proper *casus amissionis*, and is no better than the averment in *Carson's* case—that somehow or other the bill had been lost. In the proof no evidence was adduced except that of the widow of Robert Nisbet, which was evidently directed to this point but was entirely negative. She was asked whether she had ever seen the bill in question, but her answer was that she had seen it at the time it was signed but not afterwards; yet it was from her as the custodier of her husband that the only adminicles—the undertaking by the defender and his wife and the notice from the National Bank to which I have already referred—were recovered. The pursuer in his evidence does not refer to the matter, and there was nothing in the ruling of the Sheriff-Substitute which would necessarily exclude evidence on this point. There is therefore nothing to overcome the presumption that the pursuer's promissory-note had been given up because it had been paid or had been deliberately destroyed by the custodier because he did not intend to enforce payment.

Apart from these legal considerations there is nothing in the circumstances disclosed in the proof to predispose one in favour of the pursuer's claim. Eight years were allowed to elapse without any demand on the defender, and in the meantime no inquiry seems to have been made with regard to the existence of the note in Robert Nisbet's hands, although that gentleman died five years ago insolvent. I think it may be reasonably inferred that neither the pursuer nor Robert Nisbet ever intended to make a claim on the defender, and that the present action is accounted for by his having recently succeeded to a little money. All this might not have availed the defender if the pursuer had been able to find the promissory-note, although even then its possession by Robert Nisbet would have raised the presumption that he had paid it and not the pursuer.

LORD GUTHRIE—On the merits of the case the defender's counsel maintained that production of the promissory-note in question, or proof in a separate process of proving the tenor of its loss, with a relevant averment and proof of the *casus amissionis*, is the necessary foundation of the pursuer's case; and he argued that there was neither relevant averment of the loss of the bill nor of the *casus amissionis*, and consequently that (without the process being sisted to allow the pursuer to bring a process of proving the tenor, in which his averments in this case showed he could not obtain decree) he was entitled to decree of dismissal or absolvitor on this ground. . . .

As regards this ground of defence, were there no difficulty in the way I think a separate process of proving the tenor could not be dispensed with. In the case of *Young* v. *Thomson*, 1909 S.C. 529, where the existence, general tenor, and loss of a pass-book was allowed to be proved incidentally without bringing a separate action of proving the tenor, Lord Dundas said—"The missing document is not of the quality, for instance, of a title-deed, but of a much

humbler kind, and is not substantively founded upon as the basis of an action but pleaded by way of exception to prove the extinction of a debt." The promissory-note in this case is by contract the basis of the pursuer's case.

But I am of opinion that there is an insuperable difficulty in the pursuer's way, which would make it useless for him to raise an action of proving the tenor. I agree with Lord Salvesen that in dealing with a document of the nature here averred there is a strong presumption that such a document would be destroyed in ordinary course, and that an averment of *casus amissionis* which amounts to no more than a bald statement of the fact of loss cannot be admitted to probation. I therefore think that the pursuer's averments on this head, which is the basis of his case, should be held irrelevant, and that no further proof should be allowed.

LORD HUNTER, who was present at the advising, gave no opinion, not having heard the case.

LORD DUNDAS was sitting in the Extra Division.

The Court dismissed the appeal, found in fact and in law in terms of the findings of the Sheriff-Substitute's interlocutor of 22nd January 1914, affirmed the interlocutor appealed against, and of new assoilzied the defender from the conclusions of the action.

Counsel for the Pursuer and Appellant—Christie, K.C.—Graham Robertson. Agents—Cowan & Stewart, W.S.

Counsel for the Defender and Respondent—Gentles—Duffes. Agents—Campbell & Smith, S.S.C.

Thursday, March 11.

SECOND DIVISION.

[Sheriff Court at Dumbarton.

DUMBARTON TOWN COUNCIL *v.* CALEDONIAN RAILWAY COMPANY AND ANOTHER.

Burgh — Property — Railway — Footway — Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 141—"*Unbuilt-on Lands*"—*Liability of Owners of Railway ex adverso of Public Road to Make Footway.*

Lands owned by a railway company upon which there is no building except a boundary wall of unusual height used as a retaining wall are "unbuilt on" within the meaning of the proviso of the Burgh Police (Scotland) Act 1892, section 141, and the owners thereof are consequently not bound to cause a footway to be made opposite the said lands at their own expense.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 141, enacts—"The owners of all lands and premises fronting or abutting on any street shall, at their own expense, when required by the commissioners, cause footways before their properties respectively on the sides of such streets to be made, and to be well and sufficiently paved or constructed with such material and in such manner and form and of such breadth as the commissioners shall direct, and the commissioners shall thereafter from time to time repair and uphold such footways: Provided always that where the lands or premises of any owner front or abut on any street for a continuous length exceeding 100 yards, and such lands or premises are unfenced or unbuilt on, or not laid out or used as a garden or pleasure ground or pertinent of a house, it shall not be lawful for the commissioners to require such owner to construct such footway, but the commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out or used as a garden or pleasure ground or pertinent of a house; and all expenses to be incurred by the commissioners in so far as recoverable from the owners shall be recoverable as a private improvement expense: Provided that nothing in this section shall apply to the footways of private streets."

The Provost, Magistrates, and Councillors of Dumbarton, *appellants*, appealed by Stated Case from a decision of the Sheriff (LEES) at Dumbarton quashing in part an order of the appellants served upon the Caledonian Railway Company and another, *respondents*, whereby the respondents were required to construct a footway along the side of their lands or premises abutting on the south side of Bankend Road, Dumbarton.

The Case as stated by the Sheriff, *inter alia*, set forth—"The following *facts* were agreed on or admitted—(1) That the respondents are the owners of lands or premises fronting or abutting on the south side of Bankend Road, Dumbarton; (2) that the said lands or premises, so far as embraced within the order or notice after mentioned, front or abut on Bankend Road for a continuous length of 220 yards; (3) that by notice, dated 18th March 1914, the appellants required the respondents, in virtue of the Burgh Police (Scotland) Act 1892, and particularly section 141 thereof, to cause a footway to be made before this portion of their said lands or premises on the side of Bankend Road; (4) that the said portion of the lands or premises referred to in said notice consists of a part of the Dumbarton and Balloch Joint Line belonging to the respondents; (5) that there is erected along the whole length of the boundary of the lands or premises embraced in said notice, so far as fronting or abutting on Bankend Road, a concrete wall varying in height from 6 feet 6 inches to 20 feet, and surmounted for the greater part of its length by iron railings, and that there is no open-